

APPENDIX CHECKLISTS, SCRIPTS, FORMS

This section of the benchbook includes forms, scripts and checklists that may be frequently utilized by the court so that they are available in one location for ready reference. The forms and checklists include:

Chapter 1, General Rules Governing Court Proceedings

- Contempt Script

- Personal Protection Order Scripts/Checklists

- Arraignment – Hearing – Plea – Sentencing

Chapter 2, Evidence

- Self-Incrimination – Caution to Witness

Chapter 3, Civil Proceedings

- Order Denying Motion for Reconsideration (form)

- Order Denying Motion for Summary Disposition (form)

- Order Scheduling Settlement Conference (form)

- Wrongful Death Settlement Checklist

- Minor's Settlement Checklist

- Bench Trial – Decision Checklist

- Findings of Fact and Conclusions of Law – Civil

- Trial Outline - Civil Case

Chapter 4, Criminal Proceedings

- Felony Arraignment Script

- Attorney Waiver Script

- Waiver of Right to Attorney and Acknowledgement of Dangers of Self-Representation (form)

- Felony Plea Agreement Script/Checklist

- Jury Waiver in Criminal Case

- Bench Trial – Decision Checklist

- Findings of Fact and Conclusions of Law - Criminal

- Trial Outline - Criminal Case

Jury Voir Dire in Criminal Case

Final Jury Instructions Checklist - Criminal

Verdict Checklist

Felony Sentencing Script/Checklist

Felony Probation Violation – Scripts/Checklists

Arrestment – Hearing – Plea - Sentencing

CONTEMPT SCRIPT

MCR 3.606

Are you _____?

Do you understand you are in court today to be arraigned on a petition alleging that you are in contempt of court for _____? [Or, should be held in contempt of court for _____.

Have you received and read the petition and do you understand the claim?

You are entitled to have a hearing on this claim [if the contempt occurred outside of the presence of the court].

Because you face the possibility of going to jail, you have the right to be represented by a lawyer, and if you cannot afford one, we will appoint one [unless lawyer already appointed].

[For criminal contempt] The petition alleges you failed to obey a court order by _____. This is a claim for criminal contempt which can be punished by up to 30 days in jail or a fine of \$250 [unless there is a more specific statutory sanction].

[For civil contempt] This petition asks that you be found in civil contempt because you can still do what you've been ordered to do. This means you could be held in jail until you comply with the court's order [unless there is another specific statutory sanction].

[for statutory contempt] This petition asks that you be found in civil contempt for _____ [reference specific statutory basis and consequence].

[Determine whether respondent desires a hearing and/or counsel. Decide whether to release or hold in custody pending hearing. Or proceed to address the merits if the respondent wishes to proceed. If convict of contempt, state standard that applies.]

Advise of appeal rights?

PERSONAL PROTECTION ORDER (PPO)
SCRIPTS/CHECKLISTS
MCL 764.15b(2)
MCR 3.701 - .709

Contempt proceedings are governed by MCR 3.708.

ARRAIGNMENT SCRIPT/ CHECKLIST - MCR 3.708(D):

This checklist should be used to arraign persons for alleged violation of PPOs who are brought before the court on bench warrant or otherwise. The arraignment must occur within 24 hours of arrest. The prosecutor or the attorney for the moving party should be present.

Are you _____?

Do you have an attorney? [or if present with counsel, have attorney identified for the record]

Do you understand you are before me for allegedly violating a personal protection order entered by the court on _____?

Did you receive written notice of the alleged violation?

On this charge, you face the possibility of up to 93 days in jail or a fine of up to \$500. Do you understand that you are entitled to contest this charge at a contempt hearing within 72 hours of your arrest unless you request additional time or additional time is requested by the prosecuting attorney? [The prosecutor may request a delay of up to 14 days under MCL 764.15b(5); P.A. 62(5)]

Do you understand that you are entitled to have an attorney represent you at the hearing, and that if you cannot afford an attorney, the court will appoint one for you?

Do you wish to have a hearing? [If requested, set hearing either within 72 hours or later if requested by defendant or the prosecuting attorney, but not later than 14 days]

Do you want to have an attorney? [Appoint attorney, if requested]

How do you plead to this charge?

[Set reasonable bond pending hearing. At a minimum, the bond should include a non-contact provision and opportunity should be given to address other possible conditions]

[If person who procured the PPO is present, direct that they appear at the hearing to give evidence on the charge of contempt. Otherwise, notify that party and direct that they appear]

HEARING CHECKLIST - MCR 3.708(H)(1)-(4):

Because the defendant is not a defendant in a criminal trial, but rather a contempt proceeding, there is no right to allocution. MCR 3.708(H) provides that the defendant has the right to be present at the hearing; the right to cross-examine witnesses; the right to present evidence; the rules of evidence are applicable; and there must be proof beyond a reasonable doubt to find the defendant guilty of a contempt offense. Brandt v. Brandt, 250 Mich App 68 (2002).

The hearing procedure is governed by MCR 3.708(H)(1)-(4). Further MCR 3.708(H)(1) specifically explains that a defendant is not entitled to a jury trial. See also Brandt v. Brandt, 250 Mich App 68, 72 (2002).

A hearing for contempt of a PPO must be held within 72 hours of arraignment, unless either the prosecution or the defense request an extension. Failure to do so results in the dismissal of the contempt charge but does not preclude subsequent prosecution on the same charge. See In Re Contempt of Tanksley, 234 Mich App 123 (2000).

The burden of proof is beyond a reasonable doubt for criminal contempt and a preponderance of the evidence for civil contempt, MCR 3.708(H)(3).

The rules of evidence apply, MCR 3.708(H)(3).

The hearing can be delayed when there is a pending criminal charge, MCR 3.708(F)(1)(a)(iii).

Judicial findings at the conclusion of hearing are required, MCR 3.708(H)(4).

PLEA SCRIPT/ CHECKLIST - MCR 3.708(E):

How do you wish to plead?

IF THE DEFENDANT STANDS MUTE OR PLEADS NOT GUILTY:

Set a hearing date.

Appoint an attorney if requested and appropriate.

Set bond.

IF A GUILTY OR NO-CONTEST PLEA IS OFFERED, SWEAR THE DEFENDANT AND ASK THE FOLLOWING:

Do you understand that by pleading guilty, you are giving up the right to a contested hearing and the right to an attorney? [Find unequivocal, knowing, intelligent and voluntary waiver of the right to hearing and to an attorney]

Do you understand that you face a potential maximum sentence of _____?

Aside from what we have said in court today, has anyone promised you anything if you plead guilty?

Has anyone threatened you to get you to plead guilty?

Is it your own free choice to plead guilty to this charge?

Are you pleading guilty because you are, in fact, guilty?

Tell me in your own words what it is that you did on or about _____ in _____ that causes you to believe you are guilty.

[If the plea is accepted] The court believes that the plea you have made is knowing, understanding and voluntary. The court is also satisfied there is a factual basis to support a finding you are guilty of the violation charged. Therefore, the court accepts the plea without having considered the presentence report.

Set date for sentencing or proceed with sentencing.

Address bond.

Advise of right to file application for leave to appeal. MCR 3.709(C)(2).

SENTENCE CHECKLIST - MCR 3.708(H)(5):

MCR 3.708(H)(5) provides:

Sentencing.

(a) if the respondent pleads or is found guilty of criminal contempt, the court shall impose a sentence of incarceration for no more than 93 days and may impose a fine of not more than \$500.00.

(b) if the respondent pleads or is found guilty of civil contempt, the court shall impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721. . . .

State the maximum possible sentence.

Give the defendant, counsel and the victim an opportunity to make a statement.

Order restitution for attorney fees, if court-appointed counsel provided.

As a part of sentence for finding of guilt for criminal contempt for violation of PPO, the court may order respondent to reimburse the state or local unit of government for expenses incurred in relation to the incident, including but not limited to expenses for emergency response, prosecution, salaries or wages for law enforcement, firefighters, EMS, prosecutors. Amount ordered shall be paid to the clerk of the court who shall transmit money to unit(s) of government named in the order to receive reimbursement.

Advise of right to appeal from sentence for criminal contempt after a contested hearing or that all other appeals are by application for leave. MCR 3.709(C).

SELF-INCRIMINATION: CAUTION TO WITNESS – FIFTH AMENDMENT

If the court should determine that it is necessary to advise the witness of his/her Fifth Amendment rights, the advice should be given out of the presence of the jury. People v Avant, 235 Mich App 499, 512-517(1999).

I caution you that under the State and Federal Constitutions, you cannot be compelled to be a witness against yourself. In other words, you do not have to give testimony that might incriminate yourself. You have a right to be represented by a lawyer, and you have a right to consult with a lawyer about the right I have just described.

If you do not want to answer a question, you may state that you are asserting your right to remain silent. I may then have to decide if you can be required to answer.

Do you understand everything I have told you?

Do you wish to testify (or continue to testify)?

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

,

Plaintiff,

v

,

Defendant.

CASE NO:

HON. J. RICHARDSON JOHNSON

**ORDER DENYING
MOTION FOR RECONSIDERATION**

At a session of said Court
held in the City and County of Kalamazoo
on the _____ day of _____, 200__.

PRESENT: HON. J. RICHARDSON JOHNSON, Circuit Judge

INTRODUCTION

The _____, has moved this court pursuant to MCR 2.119(F), to reconsider its Order. The grant or denial of a motion for rehearing is a matter addressed to the sound discretion of the trial judge. **Brown v Libbey-Owens-Ford Co**, 166 Mich App 213, 216 (1987), citing **Brown v Northville Regional Psychiatric Hospital**, 153 Mich App 300 (1986), and **Smith v Sinai Hospital of Detroit**, 152 Mich App 716 (1986). A motion for reconsideration must demonstrate "palpable error" by which the Court and the parties have been misled. MCR 2.119 (F)(3); **Cason v Auto Owners Ins Co**, 181 Mich App 600, 605 (1989). "[T]he 'palpable error' requirement of MCR 2.119(F)(3) merely provides guidance to the trial court in deciding reconsideration motions and does not operate to restrict the trial court's discretion in determining whether a grant for reconsideration is appropriate in a particular case." **Fetz Engineering v Ecco Systems**, 188 Mich App 362, 373 (1991). Having reviewed all materials relevant to this motion, the _____ has not demonstrated palpable error by which the Court or the parties have been misled.

NOW, THEREFORE, the Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

Dated: _____

J. RICHARDSON JOHNSON, Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

Plaintiff,

v

Defendant.

CASE NO:

HON. J. RICHARDSON JOHNSON

**ORDER DENYING
MOTION FOR SUMMARY
DISPOSITION**

At a session of said Court
held in the City and County of Kalamazoo
on the _____ day of _____, 20____.

PRESENT: HON. J. RICHARDSON JOHNSON, Circuit Judge

On date, _____ filed a Motion for Summary Disposition pursuant to MCR 2.116.

On date, _____ filed an Answer to the Motion for Summary Disposition.

The Court's Pretrial Summary and Scheduling Order of date, required that all dispositive motions be scheduled and heard 28 days before mediation. Mediation is scheduled for date. The Motion for Summary Disposition was filed on date, but was not scheduled to be heard until date; less than 28 days before mediation. Since the motion for summary disposition is not timely, as directed by the Court's Pretrial Summary and Scheduling Order, it will be denied without prejudice and without requiring a response or oral argument. MCR 2.116(G), 2.119(C) and (E), and 2.401(B) and (C).

THEREFORE, IT IS ORDERED, that the Motion for Summary Disposition dated date, is DENIED WITHOUT PREJUDICE. _____ may reschedule the motion to be heard after the parties have responded to the mediation evaluation as provided by MCR 2.403(L).

IT IS SO ORDERED.

Dated: _____

J. RICHARDSON JOHNSON, Circuit Judge

PROOF OF MAILING

I, _____, certify that on this date, I mailed a copy of this **ORDER DENYING MOTION FOR SUMMARY DISPOSITION** to counsel for the parties by ordinary mail to their above stated addresses.

Date: _____

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

,

Plaintiff,

v

,
Defendant.

CASE NO:

HON. J. RICHARDSON JOHNSON

**ORDER SCHEDULING
SETTLEMENT CONFERENCE**

At a session of said Court
held in the City and County of Kalamazoo
on the _____ day of ____, 200__.

PRESENT: HON. J. RICHARDSON JOHNSON, Circuit Judge

This case having come before the Court for a pretrial conference, and it appearing to the Court that this is an appropriate case for a settlement conference, and that Insurance Co , which the Court is advised may have a lien pursuant to the Worker's Disability Compensation Act, MCL 418.827, or otherwise, and this order being authorized under MCR 2.401(F), and the Court being fully advised in the premises;

Now therefore, IT IS ORDERED, that:

1. This case is scheduled for a settlement conference with the Court on date at time ;
2. The parties or their representatives with settlement authority shall be present with counsel;
3. Insurance Co shall also have their representative with settlement authority present and may also be represented by an attorney for purposes of such conference without being required to file an appearance in the case.

Dated:_____

J. RICHARDSON JOHNSON, Circuit Judge

**WRONGFUL DEATH SETTLEMENT
CHECKLIST
MCL 600.2922**

INITIAL PLEADINGS:

Is there an estate? MCL 600.2922(2)

Is plaintiff the personal representative? MCL 600.2922(2).

Was a copy of the complaint and required notice served on persons who may be entitled to damages? MCL 600.2922 (2), (3) and (4).

SETTLEMENT:

Hearing is required to approve settlement if motion filed. Notice of the hearing is not required. MCL 600.2922(5).

The court should decide whether the deceased experienced conscious pain and suffering since that claim belongs to the estate. MCL 600.2922(6)(d). Normally, plaintiff requests a finding there was no conscious pain and suffering so part of the settlement will not go through the estate. May wish to determine that there is no probate estate, and/or no creditors, before deciding there was no pain and suffering.

Court may also review and approve attorney fee and expenses. MCR 8.121 addresses attorney fees permitted in personal injury or wrongful death case.

DISTRIBUTION:

Motion to approve distribution often combined with motion to approve settlement. MCL 600.2922(6).

Notice of hearing required, unless waived, on the motion to distribute proceeds. MCL 600.2922(6)(b).

All the parties entitled to the proceeds can stipulate to the distribution and the court shall enter an order in accordance with the stipulation. MCL 600.2922(6)(e).

A person must present a claim for damages by the hearing date or their claim is barred. MCL 600.2922(7). The claim may also be barred if they did not advise plaintiff's attorney of any material fact which may be evidence of a claim for damages.

If no lawsuit has been filed, the Probate Code applies. MCL 600.2922(9).

**SETTLEMENTS FOR MINORS AND LEGALLY INCAPACITATED INDIVIDUAL
CHECKLIST
MCR 2.420**

Settlement must be approved by the court. The judge shall pass upon the fairness of the proposal. MCR 2.420(B).

It is good practice to require testimony and acceptance of settlement by the plaintiff.

If the claim is personal injury;

the injured person shall appear before the court, unless excused for good cause; and

the judge may require medical testimony, in court or by deposition. MCR 2.420(B)(1).

If the next friend, guardian or conservator will share in the settlement, a guardian ad litem must be appointed. MCR 2.420(B)(2).

Make sure bond has been approved by and filed with Probate Court. MCR 2.420(B)(3). The Kalamazoo County Probate Court has a form for this process.

Find that the payment arrangement is in the best interests of the minor or legally incapacitated individual. MCR 2.420(B)(3).

For a minor, a settlement of less than \$5,000. can be paid as provided by MCL 700.5102. Otherwise, a conservator must be appointed by the Probate Court before the entry of judgment or dismissal. MCR 2.420(B)(4).

If no lawsuit has been filed, the Probate Code applies. MCR 2.420.

**BENCH TRIAL
DECISION CHECKLIST**
MCL 600.2101; MCL 768.29
MCR 2.517
MCR 6.403

DECISION:

Generally. In a bench trial, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” MCR 2,517(A)(1). “Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). Articulation is designed to aid appellate review. People v. Johnson (On Reh), 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. People v. Smith, 211 Mich App 233, 235 (1995).

DECISION CHECKLIST:

Statement of Case;

Issues;

Applicable **statutes**, if any;

Applicable **jury instructions** (including elements of the offense in a criminal case);

Burden of proof;

Any **presumptions** which may apply;

Analysis;

Findings of facts covering essential elements and issues with a level of specificity that will disclose to a reviewing court the controlling choices made between competing factual assertions, Holbern v Holbern, 91 Mich App 566, 569 (1979). A trial judge sitting as the trier of fact may not enter an inconsistent verdict. People v Walker, 461 Mich 908 (1999);

Conclusions of law; and

Direct entry of the **appropriate judgment**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW – CIVIL

WHEN REQUIRED:

Bench Trial. MCR 2.517(A)(1).

Involuntary Dismissal. MCR 2.504(B)(2).

Non-Standard Jury Instruction. MCR 2.516 (D)(3).

Motion for New Trial or to Amend Judgment. MCR 2.611(F).

WHEN NOT REQUIRED:

Any Motion where not required. MCR 2.517(A)(4).

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its findings of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

STANDARD OF REVIEW:

A court reviews a trial court's findings of fact for clear error. MCR 2.613(C); In re Stafford, 200 Mich App 41, 42-43 (1993).

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. Tuttle v. Dep't of State Hwys, 397 Mich 44, 46 (1976).

TRIAL OUTLINE - CIVIL CASE

1. Have the case called for trial.
2. Jury is selected. MCR 2.511.
3. Swear jury. MCR 2.511(G)
4. Give preliminary instructions to the jury. MCR 2.516(B)(1).
5. Ascertain whether any party wishes to invoke the rule to exclude from the courtroom witnesses scheduled to testify in the case. MRE 615.
6. Plaintiff's counsel makes opening statement. MCR 2.507(A).
7. Defense counsel makes opening statement (unless permitted to reserve). MCR 2.507(A).
8. Plaintiff's counsel calls witnesses for the plaintiff. MCR 2.507(B).
9. Plaintiff rests.
10. Hear appropriate motions. MCR 2.515.
11. Defense counsel makes opening statement if he or she has been permitted to reserve. MCR 2.507(A).
12. Defense counsel calls witnesses for the defense.
13. Defense rests.
14. Plaintiff call rebuttal witnesses.
15. Plaintiff rests on its entire case.
16. Defense rests on its entire case.
17. Consider appropriate motions.
18. Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. MCR 2.516(C).
19. Closing arguments by counsel MCR 2.507(E).
20. Charge the jury. MCR 2.516(B)(3).
21. Rule on objections to the charge and make any additional appropriate charge. MCR 2.516(C).
22. Excuse and thank alternate juror(s).
23. Swear bailiff. MCL 768.16.
24. Instruct the jury to go to the jury room and commence its deliberations.
25. Determine which exhibits are to be sent to the jury room.
26. Have the clerk give the exhibits and the verdict forms to the jury.
27. Recess court during the jury deliberations.
28. Before responding to any communications from the jury, consult with counsel on the record.
29. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.
30. If the jury reports that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked, declare a mistrial. If you are not so convinced, direct them to resume their deliberations. MCR 2.512(C)(4).
31. When the jury has agreed on a verdict, reconvene court and take the verdict. MCR 2.512; 2.514.
32. Poll the jury on the request of either party. MCR 2.512(B).
33. Thank and discharge the jury.
34. Enter judgment upon the verdict.
35. Adjourn or recess court.

SOURCE:

Benchbook for U.S. District Court Judges.

FELONY ARRAIGNMENT SCRIPT
MCL 767.37
MCR 6.005, MCR 6.104(E), MCR 6.113(B)

Are you _____?

Have you been given a copy of the information?

You are charged with (state the charges and potential penalties).

(Advise of the right to counsel).

(If the accused is not represented by a lawyer, must advise);

You have the right to remain silent.

Anything you say orally or in writing can be used against you in court.

You have the right to have a lawyer present during any questioning you consent to.

If you do not have the money to hire a lawyer, the Court will appoint a lawyer to represent you.

You have a right to have a lawyer represent you at all subsequent court proceedings, and if you cannot afford one, the Court will appoint a lawyer.

(If the defendant has waived an attorney, the court must advise the defendant of the pleading options).

(Enter plea of not guilty unless other plea made, in which case, proceed in accordance with MCR 6.301, etc.).

(Consider bond).

(Schedule next date if appropriate).

ATTORNEY WAIVER SCRIPT
MCR 6.005

QUESTIONING THE DEFENDANT:

Do you understand that you have the right to have a lawyer represent you in this case? MCR 6.005(A)(1).

Do you understand that I will appoint a lawyer to represent you if you cannot afford a lawyer? MCR 6.005(A)(2).

Do you want to have a lawyer represent you? MCR 6.005(A).

Can you afford a lawyer? MCR 6.005(A) and (B).

Advise the defendant of the charge(s), the maximum possible sentence and any mandatory minimum sentence. MCR 6.005(D)(1).

Offer the defendant the opportunity to consult with a lawyer and, if indigent, the opportunity to consult with an appointed lawyer. MCR 6.005(D)(2).

Question the defendant, at a minimum, on the following to determine the waiver is unequivocal and they understand the risks of self-representation, MCR 6.005(D)(1):

- a. The defendant's educational background;
- b. Have they represented themselves before;
- c. Why do they wish to represent themselves; and,
- d. Elaborate on risks of self-representation:
 - (1) Elements of offense.
 - (2) Rule of procedure
 - (3) Rules of evidence.
 - (4) Jury selection and instructions.
 - (5) Preservation of issues for appeal.
 - (6) Self-representation is almost always unwise.
 - (7) They will receive no special treatment and can receive no help from the judge.
 - (8) The prosecutor is an experienced trial lawyer who is unlikely to give the defendant any special consideration.
 - (9) They will receive no special help from the court staff and will be expected to follow the same requirements that apply to practicing lawyers.

Ask the prosecuting attorney if the court has complied with MCR 6.005. While not required, this may be advisable.

DETERMINATION:

- a. The waiver is knowingly, intelligently and voluntarily made;
- b. The waiver is unequivocal;
- c. The defendant understands the disadvantages of self-representation; and self representation will not disrupt, unduly inconvenience or burden the court.

STATE OF MICHIGAN 9TH CIRCUIT COURT KALAMAZOO COUNTY	WAIVER OF RIGHT TO ATTORNEY AND ACKNOWLEDGEMENT OF DANGERS OF SELF-REPRESENTATION	CASE NO.
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Court Address
227 WEST MICHIGAN AVENUE, KALAMAZOO, MI 49007

Court Telephone No.

THE PEOPLE OF THE STATE OF MICHIGAN	V	DEFENDANT
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I have been accused of a crime and I have read or have had read to me the charge or charges. The judge has told me the nature of the charges and that there may be lesser included offenses, defenses or mitigating circumstances about which I should know. I understand the maximum possible sentence.

I know I have the right to a lawyer and the right to be my own lawyer. I understand the court will appoint a lawyer for me at public expense if I cannot afford one. The judge has warned me that it is dangerous and unwise to be my own lawyer, because I will be held to the same standards of law and procedure as a lawyer and will not get any special treatment from the court. The judge has warned me that I may hurt my own case and that the State has an experienced lawyer. I understand I have the right to consult with a lawyer that I hire or the court appoints. I understand the risks of being my own lawyer.

The judge has warned me that a lawyer has skills and expertise that I do not have in preparing for and conducting a criminal defense. The court has told me that I will have to abide by the same rules in court as lawyers do. Even if I make mistakes, I will be given no special privileges or benefits, and the judge will not help me. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor I will face in this case, I will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what is appropriate direct and cross examination of witnesses, what motions I must make and when to make them during the trial to permit me to make post-trial motions and protect my rights on appeal, and what constitutes appropriate closing argument to the jury.

I have _____ years of education. I read English and am mentally sound.

I am ☐ very ☐ somewhat ☐ not familiar with the rules of evidence and procedure.

IN SPITE OF THE WARNINGS I HAVE BEEN GIVEN, I DO NOT WANT TO HIRE A LAWYER OR HAVE ONE APPOINTED FOR ME. I DO NOT WANT STAND-BY COUNSEL. I WANT TO BE MY OWN LAWYER. I HAVE NO DOUBT ABOUT MY DECISION.

Dated: _____

Signature of Defendant

FELONY PLEA

SCRIPT/CHECKLIST

MCL 768.35

MCR 6.302

SWEAR THE DEFENDANT.

Are you _____?

Is Mr./Ms. _____ your lawyer?

Have you had a full and complete opportunity to consult with your lawyer about this case before coming into court today?

(To the prosecutor): Is there a plea agreement?

(To the defense attorney): Is that the plea agreement? (Make sure also waive reading of Information, if plea at time of arraignment.)

(To the defendant): Did you hear and understand the plea agreement placed on the record by the lawyers?

Is this what you have agreed to do?

Do you ask that I accept the plea agreement?

(Address any Cobbs agreement. Confirm the sentence discussions were initiated by one of the parties, and identify the party. Confirm that the other party was present for the discussions or agreed that they could occur. Confirm the maximum sentence agreed to by the court based on the preliminary evaluation of the case. Confirm the defendant may withdraw the plea if the court decides to impose a sentence greater than that agreed upon.)

Are you presently on probation or parole? (If the answer is "yes", determine why and explain this may have an impact on the probation or parole status and may also affect the possible sentence. The prosecuting attorney has a duty to advise regarding consecutive sentencing.

You are charged with _____ (describe the felony).

This felony carries a maximum possible sentence of _____. (Also state mandatory minimum sentence if required. Advise if offense is non-probationable.)

(Explain the plea agreement to the defendant. In possible probation cases, may want to explain the possibility of up to one year in the county jail as a condition of probation.)

(To the defendant): With all of this in mind how do you plea to the charge?

If your plea is accepted, you will not have a trial of any kind, and so you are giving up rights you would have had at a trial including these rights:

- a. To be tried by a jury;
- b. To be tried by the court without a jury, if you choose and the prosecutor and the court consent;
- c. To be presumed innocent until proved guilty;
- d. To have the prosecutor prove beyond a reasonable doubt that you are guilty;
- e. To have the witnesses against you appear at the trial;
- f. To question the witnesses against you;
- g. To have the court order any witnesses you have for your defense to appear at the trial;
- h. To remain silent during the trial;
- i. To not have that silence used against you; and
- j. To testify at the trial if you want to testify.

Do you understand each of these rights?

Do you understand that if I accept your plea, you will be waiving or giving up every one of these rights?

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and it would be up to them whether they would. Do you understand that?

You may also give up the right to have an attorney appointed at public expense to try to appeal or for other post-conviction remedies. (Caution: check current law on right to appellate counsel.)

There are some claims you will be giving up if I accept your plea. You will give up any claim that your plea was the result of promises or threats that I am not told about today and also give up any claim that it was not your own free choice to plead (guilty or no contest). Do you understand that?

Do you understand that I am not bound to follow the sentence disposition or recommendation agreed to by the prosecutor (unless I have agreed to it) and if I choose not to follow it, you will be allowed to withdraw from the plea agreement?

(For no contest plea) do you understand that for the purposes of sentencing, I will be treating you as though you were found guilty of this offense?

Other than what we have said in court today, has anyone promised you anything if you plea guilty (or no contest)?

Has anyone threatened you to get you to plea guilty (or no contest)?

Is it your own free choice to plea guilty (or no contest) to this offense(s)?

Are you pleading guilty because you are, in fact, guilty? (if guilty plea)

On or about _____ (date) in the _____ of _____, County of _____, did you (elements of offense)? (or, for elements of the offense, have them describe what they did which leads them to believe they are guilty.)

No-contest plea. A no-contest plea requires the court's consent . If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. Instead, the court must state why a plea of nolo contendere is appropriate; and hold a hearing which can be done at that time, to establish support for a finding that the defendant is guilty of the offense. Ordinarily the attorneys will stipulate to the use of the police report or the transcript of the preliminary examination. It may also be a good idea to obtain the defendant's consent to this process.]

Counsel, do you feel that the elements of the offense charged have been fully covered by the defendant's statement of the facts?

Counsel, are either of you aware of any promises, threats or inducements related to the defendant's plea other than those already disclosed on the record?

Counsel, has the court fully complied with subsections B through D of MCR 6.302?

(To the defendant): Once again, how do you wish to plea?

The court believes that the plea made is accurate, understanding and voluntary. The court is also satisfied there is a factual basis to support a finding that you are guilty of the offense(s) charged. Therefore, the court (choose one):

- a. Accepts the agreement without having considered the presentence report.
- b. Takes the plea agreement under advisement.
- c. Accepts the agreement after having considered the presentence report. (In which event the court must sentence the defendant to the sentence agreed to or recommended by the prosecutor.)
- d. Rejects the agreement.

(Address bond).

Sentencing in this case will take place on _____.

JURY WAIVER IN CRIMINAL CASE

MCL 763.3

MCR 6.401 and 6.402

SWEAR THE DEFENDANT AND COVER:

Advise the defendant of his constitutional right to a jury trial;

Address the defendant personally and ascertain whether:

- (1) Defendant understands his right to have a jury trial;
- (2) Defendant has consulted with his attorney (or had an opportunity to consult with an attorney);
- (3) Defendant is voluntarily giving up his right to a jury trial and be tried by the court.

Ask:

- Has anyone promised you anything to get you to waive a jury trial?
- Has anyone threatened you to get you to waive a jury trial?
- Is it your free choice to waive a jury trial in this case?

Have the written waiver form read to the defendant and obtain his signature on the record. The statute, MCL 763.3, provides language for a written waiver form. This is not required by the court rule, MCR 6.402, which supersedes the statute. See staff comment following MCR 6.402 and MCR 6.001(E).

It is still a good practice to use a written waiver.

OBTAIN CONSENT OF THE PROSECUTOR:

The statute and MCR 6.401 require the consent of the prosecutor and the approval of the court.

MAKE A RECORD OF PRIOR INVOLVEMENT:

Make a record of the court's prior involvement with the case and consider reassignment if the court is too familiar with the file, see MCR 2.003. Consider obtaining express approval of parties to proceed if the court has had prior involvement. The case should be reassigned if the court has significant information regarding the case which would not be in evidence during the trial, such as defendant's failure of a lie detector test.

FIND:

Defendant has been arraigned and properly advised of the right to a jury trial;

Defendant has had an opportunity to consult with counsel; and,

The waiver has occurred in open court as required by law.

The waiver has been made voluntarily, intelligently and understandingly.

ACCEPT WAIVER.

**BENCH TRIAL
DECISION CHECKLIST**
MCL 600.2101; MCL 768.29
MCR 2.517
MCR 6.403

DECISION:

Generally. In a bench trial, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” MCR 2.517(A)(1). “Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” MCR 2.517(A)(2). Articulation is designed to aid appellate review. People v. Johnson (On Reh), 208 Mich App 137, 141 (1994). Findings are sufficient if it appears that the court was aware of the issues and correctly applied the law. People v. Smith, 211 Mich App 233, 235 (1995).

DECISION CHECKLIST:

Statement of Case;

Issues;

Applicable **statutes**, if any;

Applicable **jury instructions** (including elements of the offense in a criminal case);

Burden of proof;

Any **presumptions** which may apply;

Analysis;

Findings of facts covering essential elements and issues with a level of specificity that will disclose to a reviewing court the controlling choices made between competing factual assertions, Holbern v Holbern, 91 Mich App 566, 569 (1979). A trial judge sitting as the trier of fact may not enter an inconsistent verdict. People v Walker, 461 Mich 908 (1999);

Conclusions of law; and

Direct entry of the **appropriate judgment**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - CRIMINAL

When Required:

1. Bench Trial. MCR 6.403.
2. Joint Representation of Defendants. MCR 6.005(F)(3).
3. Directed Verdict (reasons required). MCR 6.419(D).
4. Impeachment by Evidence of Conviction of a Crime. MRE 609(b)
5. Probation Revocation. MCR 6.445(E)(2).
6. Post-Appeal Evidentiary Hearing. MCR 6.508(E).

When Not Required:

Any motion where not required.

While always preferable for purposes of appellate review, the trial court is not required to explain its reasoning and state its finding of fact on pretrial motions. People v. Shields, 200 Mich App 554, 558 (1993). See also MCR 2.517(A)(4).

TRIAL OUTLINE - CRIMINAL CASE

1. Have the case called for trial.
2. Jury is selected. MCR 6.412.
3. Swear jury. MCR 6.412(F); MCR 2.511(G).
4. Give preliminary instructions to the jury. MCR 6.412(B).
5. Ascertain whether any party wishes to invoke the rule to exclude from the courtroom witnesses scheduled to testify in this case. MRE 615.
6. Prosecutor makes opening statement. MCR 6.414(B).
7. Defense counsel makes opening statement (unless permitted to reserve). MCR 6.414(B).
8. Prosecutor calls witnesses.
9. Prosecutor rests.
10. Motion for directed verdict of acquittal. MCR 6.419.
11. Defense counsel makes opening statement if he or she has been permitted to reserve. MCR 6.414(B).
12. Defense counsel calls witnesses for the defense.
13. Defense rests.
14. Prosecutor rebuttal.
15. Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. MCR 6.414(F).
16. Closing arguments by prosecution, closing argument by defense, rebuttal by prosecution. MCR 6.414(E).
17. Charge the jury. MCR 6.414(F).
18. Rule on objections to the charge and make any additional appropriate charge.
19. Excuse and thank alternate juror(s). MCR 6.411
20. Swear bailiff. MCL 768.16.
21. Instruct the jury to go to the jury room and commence its deliberations.
22. Determine which exhibits are to be sent to the jury room. MCR 6.414(G).
23. Have the clerk give the exhibits and the verdict forms to the jury.
24. Recess court during the jury deliberations.
25. Before responding to any communications from the jury, consult with counsel on the record. MCR 6.414(A) and (H).
26. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide either for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.
27. If the jury reports that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked, declare a mistrial. If you are not so convinced, direct them to resume their deliberations. Consider giving approved Allen-type charge to the jury before declaring a mistrial. M Civ JI 3.12.
28. When the jury has agreed on a verdict, reconvene court and take the verdict. MCR 6.420.
29. Poll the jury on the request of either party. MCR 6.420(C).
30. Thank and discharge the jury.
31. If the verdict is "not guilty," discharge defendant.
32. If defendant has been found guilty, determine whether defendant should be committed to custody and schedule sentence.
33. Adjourn or recess court.

SOURCE:

Benchbook for U.S. District Court Judges.

VOIR DIRE QUESTIONS FOR THE COURT IN CRIMINAL CASE:

Know anything about case?

Personal concerns, commitments or problems that would interfere?

Prior jury service? Type of case and result?

Ever been a witness in a case?

Ever been a party in a case?

They or close relative or friend victim of crime?

Have they or a close relative or friend ever been accused of a crime?

They, family or friends involved in law enforcement?

They, family or friends involved in criminal defense?

Possible bias because of race, sex or other reasons?

Member of any advocacy groups?

Able to sit in judgment of another person or persons?

[Elaborate on burden of proof?]

[Elaborate on any special claims or defenses?]

FINAL INSTRUCTIONS CHECKLIST - CRIMINAL

Explain how jury instructions are assembled. Parties request. Court ultimately selects.

- Outline sections.
- Introduction.
- Evidence.
- Elements of offense.
- Deliberations.

Mark jury instructions as court's exhibit.

Read jury instructions.

Review and read verdict form.

Excuse juror(s).

Swear bailiff.

Bailiff takes:

- Exhibits.
- Jury Instructions.
- Verdict form.

VERDICT CHECKLIST

Confirm jury has reached verdict.

Have foreperson stand.

Read verdict - judicial aide or judge inquires.

Confirm unanimous verdict.

Poll.

Have bailiff take verdict form.

Dismiss jury.

Direct entry of judgment.

Set sentencing if conviction.

Address bond.

Attorneys take exhibits and sign for them.

FELONY SENTENCING

SCRIPT/CHECKLIST

MCL 769.1 et seq

MCL 771.14

MCR 6.425(D) and (E)

Are you _____? MCL 768.3.

Is _____ your attorney?

Do you realize you may be sent to prison for up to ____ years or fined up to ____ dollars or both?

Are you ready to be sentenced today?

Counsel, I have scored the sentencing guidelines in this case as _____. Are there any objections to that scoring? MCR 6.425(D)(1). (Is it stipulated that the scoring is correct?)

(To defendant's attorney) Have you and your client read the presentence report? MCR 6.425(D)(2)(a).

(Ask defense attorneys, defendant and prosecutor) Are there any corrections, additions or deletions to be made in the presentence report? MCR 6.425(D)(2)(b). Corrections are governed by MCL 771.14(5) and MCR 6.425(D)(3). Direct presentence report be retyped if significant changes are made.

(Ask defense counsel if they have any comment regarding sentence). MCR 6.425(D)(2)(c).

(Ask defendant if he has any comments before sentence is imposed). MCR 6.425(D)(2)(c). (While the trial judge need not specifically ask the defendant if he/she has anything to say on his/her own behalf before sentencing, it is the author's view that a direct question to the defendant is the best course of action.) See People v. Petit, 466 Mich 624, 628 (2002).

Do the people wish to be heard? MCR 6.425(D)(2)(c).

(Give the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence). MCR 6.425(D)(2)(c).

(Make comments based upon the presentence report. MCR 6.425(D)(2)(e). State the reasons for the sentence: punishment, rehabilitation, protect society, deterrence People v Snow, 386 Mich 586 (1972); People v Coles, 417 Mich 523 (1983)).

(State if the sentence is within the sentencing guidelines. Advise the defendant if the sentence is a departure from the guidelines and that defendant can appeal the departure. Consider commenting that the sentence presumptively meets the test of proportionality, since it is within the guidelines, People v Milbourn, 435 Mich 630 (1990)).

(Impose sentence, following the presentence report, if using the recommendation). MCR 6.425(D)(2)(d).

(for prison sentence): "It is the sentence of the court that you, _____, shall be forthwith committed to the Michigan Department of Corrections for the purpose of classification and shall be confined in such state penal institution as shall be duly designated for a term of not less than ____ years (not more than 2/3 of maximum) and not to exceed ____ years (maximum sentence), from and including this date. You are committed (or remanded) to the custody of the sheriff."

Give credit for time in jail if appropriate, MCR 6.425(D)(2)(d). See MCL 750.195(2), and 768.7a and .7b for exceptions.

Cover whether sentence is concurrent or consecutive, MCL 769.1h. Sentences must be concurrent absent statutory authority for consecutive sentences. People v Sawyer, 410 Mich 531, 534 (1981).

Order full restitution if appropriate. MCR 6.425(D)(2)(f), MCL 780.766(2), People v Ronowski, 222 Mich App 58, 60-61 (1997).

Advise of rights. MCR 6.425(E). (Caution: check current law on right to appellate counsel)

You have a right to ask the Court of Appeals to review this case and to ask for a lawyer for that purpose. I am not likely to grant that request because you were sentenced within the sentencing guidelines after you plead.

You are being handed a form for requesting counsel which you should use if you want to request a lawyer. MCR 6.425(E). Your request for an attorney must be made within 42 days after this sentencing. MCR 6.425(E).

You are also being handed a form you can use to file your own appeal. You must follow the instructions and file it with the Court of Appeals in the next 21 days.

Entertain motion by Prosecutor to dismiss other charges.

Cancel bond.

FELONY PROBATION VIOLATION - ARRAIGNMENT
SCRIPT/CHECKLIST
MCL 771.4
MCR 6.445

Are you _____?

Is _____ your attorney? [If attorney present]

Your probation agent has filed a petition alleging that you have violated your probation order.

Have you received and read the petition?

When did you receive a copy of the petition?

Have you had a sufficient opportunity to read the charges against you and do you understand them?

Do you understand that the maximum possible sentence you may receive is _____ along with a fine of _____?

You have a right to contest the charges made against you at a hearing, and if you are in custody, you have a right to a hearing within 14 days or you may be released from custody pending the hearing.

You also have the right to consult with an attorney and to the assistance of an attorney at the hearing and at all subsequent court proceedings.

If you want an attorney and are financially unable to retain one, the court will appoint an attorney for you at public expense.

You should understand that there are risks in representing yourself if you decide to waive an attorney and, if you want, the court will give you an opportunity to consult with a lawyer before entering your plea. [See MCR 6.005 (D) and (E)]

How do you wish to plea? [See next pages for steps following plea]

**FELONY PROBATION VIOLATION – HEARING
CHECKLIST
MCL 771.4
MCR 6.445**

The hearing procedure is governed by MCR 6.445(E).

The burden of proof is a preponderance of the evidence, MCR 6.445(E)(1).

The rules of evidence do not apply, MCR 6.445(E)(1) and MRE 1101(b)(3).

The hearing can be delayed when there is a pending criminal charge, MCR 6.445(C).

Judicial findings at the conclusion of hearing are required, MCR 6.445(E)(2) and 6.403.

- Did the probationer violate the probation order?
- Should probation be continued or revoked?

**FELONY PROBATION VIOLATION – PLEA
SCRIPT
MCL 771.4
MCR 6.445**

SWEAR THE DEFENDANT & ASK:

Do you understand that you face a potential maximum sentence of _____ if you have violated probation?

Do you understand that by pleading guilty, you are giving up the right to a contested hearing and the right to an attorney?

[Find unequivocal, knowing, intelligent and voluntary waiver of the right to hearing and to an attorney. “[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his right to counsel and the appointment of counsel, if he is indigent, and determines that there is a knowing and intelligent waiver of that right.” People v Belanger, 227 Mich App 637, 647 (1998).]

Aside from what we have said in court today, has anyone promised you anything if you plead guilty?

Has anyone threatened you to get you to plead guilty?

Is it your own free choice to plead guilty to this charge?

Are you pleading guilty because you are, in fact, guilty?

Tell me in your own words what it is that you did on or about _____ in _____ that causes you to believe you are guilty of the violation.

[If the plea is accepted] The court believes that the plea you have made is knowing, understanding and voluntary. The court is also satisfied there is a factual basis to support a finding you are guilty of the violation charged. Therefore, the court accepts the plea without having considered the presentence report.

Set date for sentencing [or proceed with sentencing if updated presentence report is not required].

Refer for a presentence report unless certain a prison sentence will not be imposed.

Set bail if appropriate.

**FELONY PROBATION VIOLATION – SENTENCING
CHECKLIST**
MCL 771.4
MCR 6.445

Determine whether presentence report is required or waived. A prison sentence may not be imposed without a current presentence report.

If there is a presentence report, give the attorneys and the defendant an opportunity to challenge the information in it.

State the maximum possible sentence.

State the sentencing guidelines and indicate whether they apply., they are a starting point for the court. [The statutory sentencing guidelines apparently do not apply since the legislation does not say that they should be used.]

Give the defendant, counsel and the victim an opportunity to make a statement.

Continue, modify, extend or revoke probation and address any terms being deleted or added. If probation is revoked, impose sentence.

Give credit for time already served, whether jail or prison sentence.

Order restitution for attorney fees, if court-appointed counsel provided.

Advise of right to appeal if there was a contested hearing. Otherwise advise probationer is entitled to file an application for leave to appeal.

Explain right to counsel to request appeal. (Caution: check current law on right to appellate counsel.)